

No profit from blood donations

16 June 2021 | Contributed by [Preslmayr Attorneys at Law](#)

Facts

Decisions

Comment

According to Section 8 of the Blood Safety Act (BSG) 1999,⁽¹⁾ blood and plasm donors must not make a profit by donating blood or plasm. The Supreme Court recently had to decide whether a lump-sum compensation for expenses must be considered profit.

Facts

The claimant, a non-profit and charitable organisation, organised blood donations among other things. The donation of blood is subject to the BSG. The claimant organised voluntary blood donations for clinical transfusiology, including the preparation, storage and allocation of blood products and components for medical purposes. The donations were made for free.

The defendant was a government enterprise of French ownership and operated seven plasm centres in Austria. It manufactured and distributed pharmaceuticals made of plasm. The defendant offered:

- a lump-sum compensation of €25 per donation;
- additional premiums for repeated donations; and
- a premium of €50 for the procurement of new donors.

Unlike the claimant's donors, the defendant's donors had to undergo an eligibility examination prior to any donation and additionally a routine check every four months.

The claimant considered the premiums offered by the defendant to be compensation for the donation of plasm and sued, requesting that the defendant cease and desist its offer of such premiums.

Decisions

The Vienna Commercial Court⁽²⁾ prohibited the defendant from granting:

- a profit as a premium for the donation of blood or plasm; and
- premiums for the procurement of new donors.

The court dismissed the claim to prohibit the defendant from:

- granting a lump-sum compensation for the donation of blood or plasm;
- granting a premium for repeated donations; and
- advertising for blood donations by offering a compensation.

The appellate court⁽³⁾ confirmed this decision.

The Supreme Court⁽⁴⁾ dismissed the claimant's appeal.

The Supreme Court does not have a leading function in the interpretation of legal matters which do not fall under the jurisdiction of the ordinary court system. Consequently, the Supreme Court is not destined to make fundamental decisions in the field of administrative law. Therefore, the interpretation of administrative regulations is not a significant question of law about which an appeal to the Supreme Court would be permitted unless the lower instances have committed a stark misinterpretation of the law. If the appellate court confirms the validity of the defendant's interpretation of administrative law, the Supreme Court need not assess whether the appellate court judged the validity correctly, but only whether the appellate court's decision is a stark misinterpretation of the law.

The appellate court justified its decision with the argument that a lump-sum compensation for travel expenses

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and time of €25 per donation of plasm was reasonably consistent with the principle of non-remuneration according to Section 8(4) of the BSG and that it was also reasonable to advertise and offer such compensation.

The appeal did not submit sufficient arguments that this opinion was a stark misjudgement. According to Section 8(4) of the BSG, donors may not be offered a profit for the donation of blood or blood components. If the donation is made for products for direct transfusion, the donation must be completely without any compensation. In such cases, a lump-sum compensation is permitted only if the donor is asked by an organisation for blood donation for an immediate donation because of an imminent need or a case of emergency.

According to the legislative materials, the prohibition of a profit for a donation achieves the principle of self-supply with voluntary gratuitous donations. For administrative purposes and to secure national self-supply, a lump-sum compensation of travel expenses and a reasonable compensation for time expenses relating to the donation is consistent with this principle to ensure that the donor suffers no expenses for the donation.

However, the lump-sum compensation must be in reasonable proportion to the donor's effort. According to consistent jurisdiction, the assessment of validity of an interpretation must consider the practice of the administrative authorities and the opinion of the Ministry of Health in charge for the enforcement of the law. Since the ministry considers lump-sum compensations for travel and time expenses in conformity with Section 8 of the BSG if they are in reasonable proportion to the real effort, the appellate court's assessment could not be considered stark misjudgement.

Comment

According to Section 502 of the Code of Civil Procedure,⁽⁵⁾ an appeal to the Supreme Court is possible only if the decision depends on the solution of a substantive or procedural question of law of significant importance for legal unity and the predictability of legal decisions. If a legal provision is not part of civil or penal law (in which case the Supreme Court is the last instance), the Supreme Court does not have a leading function in the interpretation of legal provisions. In this case, the Supreme Court assesses only whether the interpretation of such provisions by the lower instances is reasonable and not a severe misinterpretation of the law.

Section 8(4) of the BSG prohibits the grant of a profit for the donation of blood or blood components. A blood donation for direct transfusion must be completely without compensation unless the donor is asked for the donation because of an imminent need in a case of emergency. The law uses the terms "profit" and "compensation of expenses" only in Section 8(4) of the BSG. The concentration of these terms in one single paragraph shows a clear intent – namely, that profit is prohibited but the compensation of expenses is permitted. 'Profit' normally constitutes a part of the consideration in excess of the value of the transferred good. Since donated blood has no trade value, any consideration is a profit. Only the inconveniences and the time expense of the donor can be compensated. It seems reasonable that a lump-sum compensation of €25 does not exceed this threshold.

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Endnotes

(1) *Blutsicherheitsgesetz* 1999 (BGBl I 44/1999), as amended.

(2) Vienna Commercial Court, 68 Cg 4/20z.

(3) Vienna Court of Appeal, 3 R 30/20h.

(4) Supreme Court, 4 Ob 183/20w; ÖBl 2021/43; ECLI: AT:OGH0002:2020:0040OB00183.20W.1126.000.

(5) *Zivilprozessordnung* RGBI 1895/112, as amended.